SUPREME COURT OF NOVA SCOTIA

Citation: *Truro Raceway Limited v. Atlantic Provinces Harness Racing Commission*, 2023 NSSC 319

Date: 20231016
Docket: 520467
Registry: Halifax

Between:

Truro Raceway Limited

Applicant

v.

Atlantic Provinces Harness Racing Commission

Respondent

v.

Northside Downs and Inverness Raceway

Intervenors

Decision

Judge:	The Honourable Justice Denise Boudreau
Heard:	August 28, 2023, in Halifax, Nova Scotia
Counsel:	James D. MacNeil, for the Applicant Mary B. Rolf, for the Respondent Vincent A. Gillis, K.C., for the Intervenors

By the Court:

[1] This is a judicial review application. It concerns a decision made by the Atlantic Provinces Harness Racing Commission (the "Commission") on December 14, 2022, in relation to intra-provincial boundaries for telephone account betting on harness racing within Nova Scotia.

[2] The Commission is a creation of the *Atlantic Provinces Harness Racing Commission Act*, SNS 1993, c. 8. It is authorized to govern, regulate and supervise harness racing within the Atlantic provinces including, inter alia, the power to govern and regulate the various forms of betting that exist in relation to harness racing.

[3] There are three licensed harness racing racetracks in Nova Scotia: Truro Raceway (located in Truro) ("Truro"), Northside Downs (located in North Sydney) ("Northside"), and Inverness Raceway (located in Inverness) ("Inverness").

[4] Prior to the Commission's decision in December 2022, the three racetracks had an informal agreement as to the sharing of telephone account betting revenue. Truro received 63 percent; Northside 22 percent; and Inverness 15 percent.

[5] In recent years, however, both Northside and Inverness became dissatisfied with this arrangement and wished to change it. Truro did not want to change it. Northside and Inverness then wrote to the Commission seeking that it become involved and impose a more formal arrangement for the sharing of these revenues. They suggested that the Commission set “market areas” for each racetrack, and that each receive the revenue from their particular “market area”.

[6] In response, the Commission invited the three racetracks to send representatives to its November 26, 2021, meeting to discuss the issue.

[7] The three racetracks provided written proposals, in advance, to the Commission for its review. Truro, in its proposal, also made a specific request in relation to the presentations; it asked that each racetrack be permitted to present its oral submissions to the Commission in private, without the other racetracks present. No reason was given for that request.

[8] This request was granted. The three racetracks each presented their submissions separately to the Commission, in the absence of the other two.

[9] Following this November 26 meeting, the Commission issued a preliminary decision on December 8, 2021. It directed that no telephone account betting revenues were to be distributed until a new revenue sharing agreement could be

agreed upon by all three racetracks. The Commission encouraged the tracks to begin negotiations without delay.

[10] In response, on December 14, 2021, counsel for Truro contacted the Commission and questioned the Commission's legal authority for making the decision that it had purported to make on December 8.

[11] On December 22, 2021, the Commission sent notice to the racetracks that its December 8 directive was being rescinded, and further advised that the status quo would remain for the 2022 season. The Commission noted that the issue would be revisited by the Commission for the 2023 season.

[12] In March 2022, the Commission sought submissions from the three racetracks as to what they would consider a "fair and equitable assignment" of the allocation of revenue boundaries for the upcoming 2023 season. The Commission further suggested some information that the racetracks should consider including in their submissions, such as suggested boundaries, each track's operations, wagering data, and so on. Written submissions were again received from all three racetracks.

[13] The Commission convened a hearing on November 14, 2022. This hearing was similar to the 2021 hearing in that each track presented separately, and

privately, to the Commission, in the absence of the others. No one had specifically requested this in relation to the 2022 hearing, but no one objected to it either.

[14] At the November 2022 hearing, the Commission also had its own legal counsel present for the submissions. At times, this person participated in the discussions/questions posed to the presenters. (Although the record does not confirm this, it has been suggested, and might be reasonable to infer, that counsel's presence in 2022 was a result of the objections raised following the Commission's 2021 decision as to its "authority".)

[15] It does not appear that any of the racetracks were made aware, in advance of the hearing, that the Commission would have its own legal counsel present. At the time of the hearing itself, no one raised any objections to this person attending.

[16] None of the racetracks sought to have their own legal counsel present at the 2022 hearing, and none of the racetracks had legal counsel present. From the record, it is clear the Commission made no comment to any of the racetracks, at any time, about whether they could (or should) have legal counsel present at the hearing. It was never mentioned; neither suggested, nor prohibited.

[17] The 2022 hearing was recorded. We know this because, as a result of the notice for judicial review, a transcript of the hearing has been prepared. I am unaware if the 2021 hearing was recorded or not.

[18] Following the 2022 hearing, the Commission issued its decision (the subject of the present judicial review) on December 14, 2022. It determined that the informal agreement between the tracks as to telephone betting revenue was, in its view, inequitable from a geographic perspective and unfairly benefitted Truro. For example, it noted that while Truro received 63 percent of the revenue, only 7.7 percent of the betting originated from Colchester County.

[19] The Commission further found that Halifax Regional Municipality ("HRM") was the main geographic generator of all these revenues. While the Commission accepted that Truro helped drive interest in harness racing in HRM (thereby justifying a greater percentage of the HRM market), it concluded that these revenues should be more equitably shared between the three racetracks.

[20] The Commission ultimately decided that each racetrack would be assigned its own home county, and that the rest of the province (excluding HRM) would be divided by county (or, if deemed appropriate, by postal code). In the case of HRM, it was to be divided as follows: Truro would be assigned all of HRM, with the

exclusion of Dartmouth. Northside and Inverness would share Dartmouth revenues (by way of an assignment of Dartmouth postal codes).

[21] Truro (hereinafter "the applicant") has brought this application for judicial review, seeking that the Commission's decision be quashed and the matter returned for a new hearing.

[22] The applicant does not challenge the Commission's decision on its substantive merits; rather, its challenge is to the process used by the Commission.

[23] It is the view of the applicant that the process used by the Commission in respect of the hearing in November 2022 was flawed in that it did not respect the rules of procedural fairness. Specifically, they submit that:

1. They were not given the opportunity to hear and respond to other racetrack submissions and proposals, and cross-examine or test the other racetrack submissions and proposals; and

2. They were not advised that legal counsel for the Commission would be present, nor were they provided the opportunity to be represented at the hearing by legal counsel.

Standard of review

[24] The first issue to be addressed is the appropriate standard of review. Although the application here is based in procedural fairness issues (and not substantive issues with the decision itself), given that the applicant seeks to quash the decision, the question of standard of review must be addressed (*Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd*., 2016 NSCA 40).

[25] All parties to this application accept that the appropriate standard of review in this case is reasonableness. I am in agreement.

[26] I must therefore consider whether the Commission's decision was reasonable in the circumstances. More to the point, in terms of the precise arguments made by the applicant here, I must consider whether the process used by the Commission in its November 2022 hearing was a fair and just process. Counsel for the Commission agrees that it owed a duty of fairness to the participants to this hearing.

[27] As to the question of procedural fairness within administrative proceedings, the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 noted:

> 22 … the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[28] The Supreme Court of Canada in *Baker*, *supra*, went on to list factors that might factor into an assessment of procedural fairness: the nature of the decision; the nature of the statutory scheme; the importance of the decision to the individual(s) affected; the legitimate expectations of the person challenging the decision; the choice of procedure by the decision-maker.

Issue #1: No opportunity to hear, test, and respond to other racetrack proposals

[29] As to this first ground of review, and before I consider the more general *Baker* factors, the applicant has pointed to section 14(2) of the *Act*, which, they say, has application:

> 14(2) The Commission shall give any person in respect of whom a hearing is held an opportunity to give evidence on oath or affirmation, to cross-examine witnesses and to call witnesses to give evidence on oath or affirmation.

[30] The applicant is of the view that section 14(2) would apply to the proceedings here, and that the Commission should have given the parties all of the opportunities contained in that section. The applicant acknowledges the wording of the section but notes that the immediately preceding section (s. 14(1)) states, “In relation to any hearing …”.

[31] The Commission has responded, in their view, that section 14(2) is not applicable here. They submit that its wording makes it clear that it is only applicable to those hearings convened in relation to "a person". For example, where a specific participant in harness racing is alleged to have breached the rules of the association, such a person can be brought before the Commission to face those allegations. Such a person is in jeopardy of sanctions or punishment by the Commission and, therefore, that person would be entitled to a process much akin to a normal "trial" process.

[32] The Commission further directed the Court to section 10 of the *Act*, which also differentiates between "hearings" and "hearings in respect of a person". For example, section 10(p) provides the power for the Commission to hold hearings relating to its statutory powers, but section 10(q) specifically provides for the Commission's power to convene hearings in respect of "a person":

> 10 The Commission may
>
> …
>
> (p) hold hearings relating to the carrying out of the powers of the Commission;
>
> (q) without limiting the generality of the power to hold hearings pursuant to clause (p), hold a hearing in respect of a person who is licensed or required to be licensed by the Commission or who participates in harness racing at any track when
>
> > (i) a written and signed complaint is made to the Commission concerning any action of the person that may indicate conduct detrimental to harness racing; or

> (ii) the Commission has reasonable and probable grounds to believe that the person has engaged in conduct detrimental to harness racing;
>
> …

[33] I find the Commission's submissions on this point to be persuasive. Firstly, as I read sections 14(1) and (2), they are clearly addressing two separate and distinct situations; section 14(1) notes that at any hearing, the Commission can summons witnesses and documents, but section 14(2) notes that at a hearing in respect of "a person", that person can give evidence, cross-examine, and call witnesses. That is clearly a different situation.

[34] That is also a logical difference for the legislator to have made. A hearing in respect of "a person" entails an examination of specific allegations against that person; procedural fairness would tell us that such a person should be able to fully respond. But such a process would not necessarily be required for every hearing undertaken by the Commission.

[35] I do not accept that section 14(2) of the *Act* has application here.

[36] It is recognized by the Supreme Court of Canada in *Baker, supra,* that procedural fairness can depend, in part, on the type and nature of hearing and decision that is taking place. Factors such as the finality of the decision, whether it

is reviewable or whether appeals are possible, are examples of questions that would properly fall into an assessment of the “nature of the decision”.

[37] Here there is no appeal process. The Commission’s decision could therefore be said to be “final”; however, such is only for the 2023 year. There is nothing preventing a revisiting of the issue in subsequent years.

[38] The applicant has also argued that this decision is very important to it, as the Commission’s decision will greatly affect its revenues for the 2023 season.

[39] However, this factor must be assessed in light of the reality that the decision of the Commission was, at least on its face, equally important to all three racetracks. Revenues of all three are/were at play.

[40] All three racetracks were subject to the same rules at the time of the hearing. None were given anything that the others were not.

[41] As noted hereinabove, it was the request of the applicant that the 2021 hearing proceed by way of private presentations by each racetrack to the Commission members, to the exclusion of the others. The Commission agreed to this procedure in 2021, and neither of the other two racetracks objected.

[42] When the parties were advised of the second hearing in 2022, this question was not “re-opened” by anyone. The applicant did not explicitly request, nor did the Commission explicitly agree to, the same procedure in 2022. However, the hearing in November 2022 did use the same procedure as in 2021; each racetrack presented separately and privately to the Commission. No objection was raised to this process by anyone.

[43] In summary, a) there was a process used at the 2021 hearing which had been specifically requested by the applicant and agreed to by all, b) there was no further discussion about what would occur at the 2022 hearing, and c) the 2022 hearing used the same process without objection by anyone. Under those circumstances, it is clearly reasonable to infer that the process used in 2022 was, in fact, the process that all parties legitimately expected would be used.

[44] Having said that, it would have been open for the applicant (or for any of the other racetracks) to have requested a new procedure. They did not. It is obvious to me that the 2022 hearing proceeded entirely as expected by all parties, at least in relation to the “private” nature of the presentations.

[45] In the final analysis, therefore, while it could be said that the Commission “chose” the procedure in 2022, in my view such was a reasonable choice given the

background to the matter. I am unable to find that their process of hearing from each racetrack separately, in the absence of the others, was in any way unfair, unjust or unreasonable in the circumstances.

Issue #2: Not being advised that Commission legal counsel would be present and/or providing opportunity to be represented by legal counsel

[46] The applicant's argument on this point is summarized in its original brief at paragraphs 41 and 42:

> 41. Although there is no automatic entitlement to counsel in the *Act* or in these types of administrative decisions generally, there are certain factors that determine whether legal counsel should be present. One of these factors is whether points of law are likely to arise in the decision. Throughout the hearings, legal counsel for APHRC asked some of the representatives about their position on the APHRC's jurisdiction to make certain decisions. These are legal questions that the race tracks were unable to properly respond to as legal counsel was not present.
>
> 42. Further, the imbalance that is created with one party having legal counsel while the other party does not can create a disparity such that all parties are not on the same footing when it comes to making presentations and answering questions posed by the APHRC and especially by its legal counsel.

[47] I have a number of difficulties with the arguments raised by the applicant.

[48] First, there were no "points of law" raised in the Commission's decision. It is true that Commission counsel was present, and that he did ask a few questions of the participants in relation to jurisdiction. However, no issues of jurisdiction (or any other point of law) were addressed in the Commission's decision.

[49] In terms of the applicant's "inability" to answer questions from counsel, it is entirely unclear to me how the applicant is in a position to make this argument. Based on the transcript I was given, it does not appear that counsel addressed any questions to the applicant during their presentation, much less legal questions. There do appear to have been a few questions posed to the other racetracks but, of course, those parties have not raised concerns.

[50] In relation to the concern raised by the applicant in its paragraph 42, I would simply say that what is described therein was not at all the situation here. The Commission was not a "party" to the proceeding before it. The Commission was the decision-maker and had no advocacy role within the proceeding.

[51] In my view, the applicant had not demonstrated that the presence of Commission counsel during the presentations had any impact on the hearing or the Commission's decision.

[52] Lastly, it is also clear that none of the parties were "denied" the opportunity to be represented by counsel at the hearing. It was simply not addressed by anyone. None of the racetracks requested to appear with counsel and none chose to appear with counsel. None of them were told to bring, or not bring, legal counsel.

[53] All three racetracks were dealt with in exactly the same way at the time of the hearing. I cannot find that the Commission's process was in any way unfair or unreasonable in relation to the applicant. I dismiss the application.

[54] If the parties cannot agree on costs, I would ask for written submissions within 30 days of this decision.

Boudreau, J.